A

SAYANG PLANTATION BHD

v.

KOH SIAK POO

B

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
RICHARD MALANJUM JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NO: K-02-359-2003]

C

29 JULY 2005

LAND LAW: *Restraints on dealings - Caveats - Lien-holder's caveat - Determination of lien-holder's caveat - Compensation for failure to timeously withdraw lien-holder's caveat - Proper provision governing*
D *compensation - National Land Code, ss. 329, 331*

LAND LAW: *Restraints on dealings - Caveats - Lien-holder's caveat - Lien ceased to exist from a certain date - Whether lien-holder's caveat ought to have been withdrawn from that date - Effect of failure to*
E *withdraw the lien-holder's caveat*

LAND LAW: *Restraints on dealings - Caveats - Lien-holder's caveat - Effects of - Whether similar to effects of private caveat - Whether failure to withdraw lien-holder's caveat upon expiry of lien would gravely curtail rights of registered proprietor - Whether such failure would cause damage*
F *or loss to the registered proprietor under s. 331(4)(b) National Land Code*

The respondent was the registered proprietor of Lot 208 held under an original title deed ('the title deed'). He was also a director and shareholder of the appellant under several share
G certificates ('the certificates'). The title deed and the share certificates were deposited with the appellant as security documents for various sums totaling RM663,000 advanced to the respondent as necessary expenses to procure several joint venture agreements for the appellant. The appellant entered a lien-holder's
H caveat against Lot 208 on 16 February 1988. The respondent failed to procure such agreements and the appellant sued for the recovery of the RM663,000. Judgment was entered for the appellant and upheld by a majority of the Court of Appeal *vide* order of 29 November 2000. Leave to appeal to the Federal Court
I was refused by the Federal Court. By letter of 30 September 2002, the respondent's solicitors – Messrs Mahinder Singh Dulku & Co ('MSD') sent to Messrs Lim Kean Siew & Co ('LKS') –

solicitors for the appellant, a cheque for RM802,125.92 purportedly 'in full and final settlement of the judgment … as varied by the order of the Court of Appeal'. However, by letter dated 1 October 2002, LKS returned the cheque to MSD stating that the sum did not represent costs awarded to the appellant. On 9 October 2002, MSD again sent the cheque to MSD stating that the sum represented the judgment sum plus interest but excluded costs which had yet to be taxed. MSD further requested LKS to return within 48 hours the respondent's documents. By letter of 11 October 2002, LKS accepted the cheque as part payment of the judgment sum plus interest without prejudice to the appellant's right to recover a balance of RM62,249.13 as costs. The cheque was also accepted subject to its clearance. The original title deed and share certificate were also returned to MSD upon its undertaking not to release the documents until notified in writing that the cheque was cleared. By letter of 21 October 2002, LKS notified MSD that the cheque had been cleared and advised MSD to release the documents to the respondent. The balance of RM62,249.13 was settled by the respondent on 20 December 2002. On 9 February 2003, the respondent applied to the High Court for *inter alia*: (i) an order canceling the caveat on Lot 208 pursuant to s. 331(a) of the National Land Code 1965 ('NLC'); (ii) an order that the appellant pay the respondent compensation for damage or loss caused by the failure to timeously withdraw the lien-holder's caveat pursuant to s. 331(4)(b) of the NLC. The appellant withdrew the caveat on 18 March 2003. The High Court Judge was of the view that compensation was recoverable by the respondent pursuant to s. 329 of the NLC. He thus ordered that damages be assessed for wrongful caveating. The appellant appealed to the Court of Appeal contending that the High Court Judge had erred in applying s. 329 of the NLC when in fact he should have satisfied himself on the criteria in s. 331 of the NLC.

Held (dismissing the appeal (by a majority))
Per Denis Ong & Richard Malanjum JJCA:

(1) It was clear that the relevant law on which the claim for compensation was based was s. 331(4) of the NLC. It was clear that the judge had mistakenly addressed his mind to s. 329 when he held that the appellant was liable to compensate the respondent under s. 329. It was also clear that nowhere in his grounds of decision did he consider

A s. 331(4) of the NLC. The relevant law applicable to the respondent's claim for compensation was s. 331 of the NLC and not s. 329. (paras 18 & 19)

(2) It was open to the Court of Appeal to decide on the question B of liability of the appellant to pay compensation to the respondent under s. 331 of the NLC. A fair inference of fact derived from the sequence of events in the instant case was that from 21 October 2002, the appellant no longer held the original title deed and the share certificates. The lien therefore C ceased to exist in fact and in equity from 21 October 2002 as regards the balance of RM62,249.13. This balance lost its character as a secured debt to become an unsecured debt and the appellant had in law by LKS's letters of 11 October 2002 and 21 October 2002 elected to recover the balance as an D unsecured debt. (paras 20 & 32)

(3) Since the lien ceased to exist from 21 October 2002, it followed that the appellant ceased to be entitled to the benefit of such lien from that date. The caveat served no protective function from that date and ought not to have remained on E the Land Register. It ought to have been removed forthwith and the appellant was duty bound to do so. However it was not withdrawn even though the balance of RM62,249.13 was settled on 20 December 2002. There was clearly a failure by the appellant of its duty to withdraw the caveat. From 21 F October 2002 to 18 March 2003 there was a lapse of nearly five months for which there was no legal justification whatever for the caveat to remain on the land register. (paras 33, 34 & 35)

G **(4)** Since a lien-holder's caveat has the like effect to that of a private caveat, the effect of a private caveat would also apply with equal force to a lien-holder's caveat. In the instant case, the caveat bound Lot 208 and prohibited any dealings with Lot 208 during its continuance on the land register from 21 H October 2002 to 18 March 2003. The caveat had in effect gravely curtailed the rights of the respondent as registered proprietor in that it wrongfully prevented him from dealing with Lot 208 over that period when the lien ceased to exist and with that the appellant's entitlement to the benefit I thereunder. The failure to withdraw the caveat before 18 March 2003 had caused damage or loss to the respondent as

envisaged under s. 331(4)(b) of the NLC. There was thus no necessity for the respondent to adduce further evidence on the issue of liability. (para 39)

(5) The caveat ought to have been withdrawn from 21 October 2002. The appellant was liable to pay the respondent compensation for damage or loss caused to the respondent from 21 October 2002 to 18 March 2003 by the failure of the appellant to withdraw the caveat. (para 40)

Per Tengku Baharudin Shah JCA (dissenting):

(1) The judge misdirected himself in law when he applied s. 329(1) which pertained to private caveats instead of s. 331(4) under which the respondent sought relief. Where the law provides a right or remedy and prescribes the manner for recourse to it, anyone seeking such right or remedy must avail himself to such manner of recourse and no other. *Land Executive Committee of the Federal Territory v. Harper Gilfillan Bhd* (folld); *Pasmore v. Ostwaldtwistle Urban District Council* [1898] AC 387 (refd). (para 57)

(2) Sections 329(1) and 331(4) are significantly different in that liability under the former is automatic whereas under the latter it is subject to preconditions being met. The court may only order the payment of compensation under para. (b) if damage or loss has been caused by the entry or failure to withdraw and not otherwise. (para 59)

(3) The words used in s. 331(4)(b) admit no uncertainty or ambiguity – in that payment may only be ordered by the court if and only if the entry or failure to withdraw a lien-holder's caveat is proved to have caused damage or loss to the applicant. Liability only arises upon proof of damage or loss. In the instant case, the respondent failed to meet the requirements of s. 331(4)(b). (paras 63, 65 & 66)

(4) On the facts, the respondent did not at any time request the appellant to withdraw the lien-holder's caveat entered 14 years earlier. Such unreasonable conduct of the respondent not only lent credence to the appellant's claim of inadvertence for the delay in the withdrawal of the caveat but also questioned the true intentions and *bona fides* of the respondent. (paras 67 & 68)

A ***Bahasa Malaysia*** *translation of headnotes*

Responden adalah pemilik berdaftar Lot 208 yang dipegang di bawah dokumen hakmilik asal ('dokumen hakmilik'). Beliau juga adalah seorang pengarah perayu serta pemegang sahamnya di
B bawah beberapa sijil saham ('sijil-sijil'). Dokumen hakmilik dan sijil-sijil saham telah disimpan dengan perayu sebagai dokumen cagaran bagi pinjaman berjumlah RM663,000, yang dipinjamkan kepada responden untuk membiayai usaha memperoleh beberapa perjanjian usahasama untuk perayu. Pada 16 Februari 1988, perayu
C memasukkan kaveat pemegang lien terhadap Lot 208. Responden gagal mendapatkan perjanjian usahama dan akibatnya perayu memfail guaman untuk mendapatkan kembali RM663,000. Penghakiman telah diberikan kepada perayu dan disahkan oleh majoriti Mahkamah Rayuan melalui Perintah bertarikh 29 November
D 2000. Kebenaran untuk merayu ke Mahkamah Persekutuan kemudiannya telah ditolak oleh mahkamah tersebut. Melalui surat bertarikh 30 September 2002, peguamcara responden – Messrs Mahinder Singh Dulku & Co ('MSD') menghantar kepada Messrs Lim Kean Siew & Co ('LKS') – peguamcara perayu, satu cek
E bernilai RM802,125.92 sebagai 'penyelesaian penuh dan muktamad penghakiman … seperti yang dipinda oleh Perintah Mahkamah Rayuan'.

Bagaimanapun, melalui surat bertarikh 1 Oktober 2002, LKS
F mengembalikan cek kepada MSD menyatakan bahawa jumlah tidak mencerminkan kos yang diawardkan kepada perayu. Pada 9 Oktober 2002, MSD sekali lagi menghantar cek kepada LKS menyatakan bahawa jumlah adalah untuk jumlah penghakiman dan faedah tetapi tidak termasuk kos yang belum ditaksir. MSD juga
G meminta LKS supaya mengembalikan dalam masa 48 jam dokumen-dokumen responden. Melalui surat bertarikh 11 Oktober 2002, LKS menerima cek sebagai sebahagian bayaran jumlah penghakiman dan faedah tanpa memprejudis hak perayu untuk mendapatkan baki RM62,249.13 sebagai kos. Cek juga diterima
H tertakluk kepada pembayarannya. Berikutnya, dokumen hakmilik asal dan sijil-sijil saham telah dipulangkan kepada MSD atas janji bahawa MSD tidak akan melepaskan dokumen-dokumen tersebut sehinggalah diberitahu secara bertulis bahawa cek telah dibayar. Melalui surat bertarikh 21 Oktober 2002, LKS memberitahu MSD
I bahawa cek telah dibayar dan menasihat MSD supaya melepaskan dokumen kepada responden. Baki sebanyak RM62,249.13 telah dijelaskan oleh responden pada 20 Disember 2002. Pada 9 Februari 2003, responden memohon ke Mahkamah Tinggi, antara

lain, untuk: (i) suatu perintah membatalkan kaveat ke atas Lot 208 di bawah s. 331(a) Kanun Tanah Negara 1965 ('KTN'); (ii) suatu perintah bahawa perayu membayar responden pampasan atas kerugian atau kehilangan yang disebabkan oleh kegagalan menarik balik kaveat pemegang lien dengan secepat mungkin di bawah s. 331(4)(b) KTN. Perayu menarik balik kaveat pada 18 Mac 2003. Hakim Mahkamah Tinggi berpendapat bahawa pampasan boleh dituntut oleh responden di bawah s. 329 KTN. Beliau dengan itu memerintahkan gantirugi ditaksir kerana pengkaveatan salah. Perayu merayu ke Mahkamah Rayuan sambil berhujah bahawa hakim Mahkamah Tinggi khilaf apabila memakai s. 329 KTN kerana beliau sepatutnya memuaskan hatinya berdasarkan kriteria yang tertera pada s. 331 KTN.

Diputuskan (menolak rayuan dengan keputusan majoriti)
Oleh Denis Ong & Richard Malanjum HHMR:

(1) Adalah jelas bahawa undang-undang relevan bagi mengasaskan tuntutan pampasan adalah s. 331(4) KTN. Adalah jelas bahawa hakim telah dengan salahnya menghalakan pemikiran beliau kepada s. 329 apabila beliau mendapati perayu bertanggungan untuk mempampas responden di bawah seksyen tersebut. Ianya juga jelas bahawa tiada apapun dalam alasan penghakiman hakim yang menunjukkan bahawa beliau telah mempertimbang s. 331(4) KTN. Undang-undang yang relevan dan terpakai kepada tuntutan responden untuk pampasan adalah s. 331 KTN dan bukannya s. 329.

(2) Adalah terbuka bagi Mahkamah Rayuan untuk memutuskan soal liabiliti perayu untuk membayar pampasan kepada responden di bawah s. 331 KTN. Andaian munasabah yang boleh dibuat dari fakta dan urutan peristiwa yang berbangkit adalah bahawa, sejak 21 Oktober 2002, perayu tidak lagi memegang dokumen hakmilik asal serta sijil-sijil saham. Dengan itu, di sisi fakta dan ekuiti, lien berkaitan baki RM62,249.13 sudah tidak wujud sejak 21 Oktober 2002. Baki tersebut telah hilang ciri sebagai hutang bercagar dan sebaliknya menjadi hutang tak bercagar, sekaligus menyebabkan perayu, melalui surat LKS bertarikh 11 Oktober 2002 dan 21 Oktober 2002, sebenarnya memilih untuk mendapat kembali baki tersebut sebagai hutang tak bercagar.

(3) Oleh kerana lien tidak lagi wujud sejak 21 Oktober 2002, ianya mengikut bahawa perayu tidak lagi berhak kepada manfaat lien tersebut dari tarikh itu. Kaveat tidak lagi bertindak sebagi pelindung dan tidak harus berada dalam Daftar Tanah. Ia harus dikeluarkan dengan segera dan perayu bertanggungan untuk berbuat demikian. Apapun, ia tidak dikeluarkan walaupun baki sebanyak RM62,249.13 telah dijelaskan pada 20 Disember 2002. Perayu jelas gagal menunaikan obligasinya untuk mengeluarkan kaveat. Dari 21 Oktober 2002 hingga 18 Mac 2003, wujud jurang selama hampir lima bulan di mana tiada justifikasi langsung untuk kaveat berada dalam Daftar Tanah.

(4) Oleh kerana kaveat pemegang lien mempunyai kesan yang sama seperti kaveat persendirian, kesan kaveat persendirian harus terpakai sepenuhnya kepada kaveat pemegang lien. Dalam kes semasa, kaveat mengikat Lot 208 dan melarang sebarang urusniaga dengan Lot 208 itu selagi ia berada pada Daftar Tanah dari 21 Oktober 2002 hingga 18 Mac 2003. Kaveat secara berkesannya telah menghalang hak-hak responden selaku pemilik berdaftar dalam ertikata ia menghindari beliau dari berurusan dengan Lot 208 dalam tempoh tersebut walaupun lien sudah tidak lagi wujud. Kegagalan menarik balik kaveat sebelum 18 Mac 2003 telah mengakibatkan kerugian dan kehilangan kepada responden sepertimana yang dibayangkan di bawah s. 331(4)(b) KTN. Dengan itu, tiada keperluan bagi responden untuk mengemukakan keterangan lanjut atas isu liabiliti.

(5) Kaveat harus ditarik balik sejak dari 21 Oktober 2002. Perayu bertanggungan untuk membayar pampasan kepada responden kerana kerugian dan kehilangan yang dialami responden dari 21 Oktober 2002 hingga 18 Mac 2003.

Oleh Tengku Baharudin Shah HMR (menentang):

(1) Hakim tersalah arah akan dirinya di sisi undang-undang apabila beliau menggunapakai s. 329(1) yang menyangkuti kaveat persendirian dan tidak s. 331(4) yang digunakan oleh responden untuk memohon relif di sini. Di mana undang-undang memperuntukkan hak atau remedi dan menetapkan cara-cara untuk memperolehkannya, maka sesiapa sahaja yang berhasrat untuk mendapatkan hak atau remedi tersebut

hendaklah menggunakan cara yang ditetapkan dan tidak kaedah-kaedah lain. *Land Executive Committee of the Federal Territory v. Harper Gilfillan Bhd* (diikuti); *Pasmore v. Ostwaldtwistle Urban District Council* [1898] AC 387 (dirujuk).

(2) Seksyen-seksyen 329(1) dan 331(4) jelas berbeza dalam ertikata bahawa liabiliti di bawah seksyen terdahulu adalah automatik sementara di bawah seksyen terkemudian ianya tertakluk kepada kepatuhan kepada syarat-syarat. Mahkamah hanya boleh memerintahkan bayaran pampasan di bawah perenggan (b) jika kerugian atau kehilangan disebabkan oleh kemasukan atau kegagalan untuk menarik balik dan tidak sebaliknya.

(3) Ayat yang digunakan di dalam s. 331(4)(b) adalah terang dan jelas – iaitu bahawa bayaran hanya boleh diperintahkan oleh mahkamah sekiranya dan hanya sekiranya kemasukan atau kegagalan menarik balik kaveat pemegang lien dibuktikan telah mengakibatkan kerugian atau kehilangan kepada pemohon. Liabiliti hanya berbangkit atas pembuktian kerugian atau kehilangan. Dalam kes semasa, responden gagal memenuhi kehendak s. 331(4)(b).

(4) Berdasarkan fakta, responden tidak pernah pada bila-bila masapun meminta perayu supaya menarik balik kaveat pemegang lien yang dimasuki 14 tahun sebelumnya. Kelakuan tidak munasabah responden sedemikian bukan sahaja menyokong dakwaan perayu tentang kelalaian dalam kelengahan menarik balik kaveat, tetapi turut mempersoalkan *bona fides* serta niat sebenar responden.

Case(s) referred to:

Duport Steel Ltd v. Sirs [1980] 1 All ER 529 ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(refd)***

Federal Territory v. Harper Gilfillan Bhd [1981] 1 MLJ 234 ***(foll)***

Infra Elite Development Sdn Bhd v. Pacific Treasure Land Sdn Bhd [2002] 4 CLJ 633 HC ***(refd)***

Land Executive Committee Of The Federal Territory v. Harper Gilfillan Bhd [1981] 1 MLJ 234 ***(refd)***

Pasmore v. Ostwaldtwistle Urban District Council [1898] AC 387 ***(refd)***

Trans-summit Sdn Bhd v. Chun Nyiok Lin [1998] 3 MLJ 247 ***(refd)***

Quill Construction Sdn Bhd v. Tan Hor Teng & Anor [2003] 7 CLJ 24 HC ***(refd)***

Wong Pot Heng v. Zainal Abidin Putih & Anor [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 SC ***(refd)***

Legislation referred to:
National Land Code ss. 281(2), 322, 323, 327(1), 329(1), 330, 331(1), (4)

For the plaintiff/appellant - Bastian Vendargon (Eng Ooi Huang with him); M/s Lim Kean Siew & Co
For the defendant/respondent - Mahinder Singh Dulku; M/s Mahinder Singh Dulku & Co

[Appeal from High Court; Alor Setar; Originating Summons No: 24-110-2003]

Reported by Andrew Christopher Simon

JUDGMENT

Denis Ong JCA:

Introduction

[1] This is an appeal by Sayang Plantation Bhd, the abovenamed defendant (the appellant) to this court from the decision of the judge of the High Court at Alor Setar, Kedah who on 8 April 2003 ordered the appellant to pay to Koh Siak Poo, the abovenamed plaintiff (the respondent), compensation for damage and/or loss consequential upon the failure of the appellant to withdraw forthwith Lien Holder's Caveat No. Perserahan 60/1988 Jilid 23 Folio 7 (the caveat) registered at the Land Office Kedah on 16 February 1988 against the land comprised in GM3423, Lot 208, Mukim Sungai Pasir, Padang Temusu, Kuala Muda District (Lot 208); such compensation to be enquired into and assessed by the deputy registrar or the senior assistant registrar of the High Court; and costs. We heard this appeal in Alor Setar and reserved judgment to a date to be fixed.

[2] The decision is not unanimous as has been pronounced in open court. There has been a division of opinion in this quorum. The majority opinion of Denis Ong Jiew Fook and Richard Malanjum (CAJJ) concur that this appeal be dismissed with costs here and below; the deposit to be paid to the respondent towards the account of taxed costs and directed afresh the deputy registrar or the senior assistant registrar to enquire into the matter of compensation for damage or loss (if any) caused to the respondent from 21 October 2002 to 18 March 2003 by the failure of the appellant to withdraw the caveat. Tengku

Baharuddin Shah bin Tengku Mahmud (CAJ) dissents. His opinion is that this appeal be allowed, the order of the High Court set aside and that the parties are to bear their own costs. The majority opinion prevails and we order accordingly. The following are the grounds of majority decision.

Facts And Background

[3] The respondent is the registered proprietor of Lot 208 under Original Title Deed No: 20386 (the Original Title Deed) and a director and shareholder of the appellant under share certificate Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20. The Title Deed and all share certificates were in the possession of the appellant, having been deposited with the latter as security documents purportedly for various sums totalling RM663,000 received by the respondent on diverse dates from the appellant to defray expenses necessary or incidental to procure three joint venture agreements for the appellant with landowners for oil palm cultivation under the appellant's schemes named "Rancangan Tanah Senggang B", "Rancangan Tanah Senggang E" and Rancangan Tanah Hong." The respondent failed to procure such joint venture agreements and the appellant sued the respondent in Ipoh High Court Civil Suit No: 23-167-1988 for the recovery of the RM663,000 and obtained judgment in the said sum against the respondent after a trial. On appeal, the Court of Appeal by a majority decision (Gopal Sri Ram and Abdul Kadir Sulaiman (CAJJ) concurring; Mokhtar Sidin (CAJ) dissenting); upheld the judgment of the Ipoh High Court on the original action and the appeal was dismissed (See the oral judgment of the majority delivered on 29 November 2000 and the written judgment of Mokhtar Sidin dated 10 July 2001 in MRRS No. A-02-190-1998). Leave to appeal was refused by the Federal Court. On 16 February 1988 the appellant entered the caveat against Lot 208 which caveat remained on the land register as at 23 January 2003 upon a search by the respondent.

[4] By a letter dated 30 September 2002 from the respondent's solicitors, M/s Mahinder Singh Dulku & Co, to M/s Lim Kean Siew & Co, solicitors for the appellant, the former enclosed a Public Bank cheque No: 046012 for RM802,125.92 (the cheque) in "full and final settlement of the judgment obtained by your client and as varied by the order of the Court of Appeal dated 29 November 2000." The text of that letter is reproduced below:

A Surat Kami: K12-23

Surat Tuan: BK/AL/685/87
30th September, 2002

M/s. Lim Kean Siew & Co
B Advocates & Solicitors
5th Floor, Wisma Penang Garden
No: 42 Jalan Sultan Ahmad Shah
10050 Penang

C Re: Ipoh High Court Civil Suit No: 23-167-1998
Sayang Plantation Berhad v. Koh Siak Poo (Court Of Appeal Civil Appeal No: A-02-190-1998
Koh Siak Poo … Appellant

v

Sayang Plantation Berhad … Respondent)

D

We refer to the above and enclose herewith our client's Public Bank Cheque No: 046012 for the sum of RM802,125-92 being full and final settlement of the judgment obtained by your client and as varied by the Order of the Court of Appeal dated 29-11-2000.

E

This cheque is sent to you on your strict undertaking to return to us immediately as solicitors for our client the Original Title Deed No: 20386, District Kuala Muda, Mukim of Sungei Pasir, Kedah and all share certificates and other security documents kept
F by your client which belongs to our client.

Kindly also forward to us the duly executed Withdrawal of Caveat that your client has entered against the above property.

…

G

Yours faithfully
(sgd.)

[5] By letter dated 1 October 2002, M/s Lim Kean Siew & Co. returned the cheque to M/s Mahinder Singh Dulku & Co and
H replied thus:

Our Reference: BK/AL/685/87

Your Reference: K12-23

1st October 2002

I

Messrs Mahinder Singh Dulku & Co.
Advocates & Solicitors
No. 25, Green Hall
10200 Penang

Dear Sirs,

Re: (1) Ipoh High Court
Civil Suit No. 23-167-1998
Sayang Plantation Berhad v Koh Siak Poo

(2) Court of Appeal of Malaysia
Civil Appeal No. A-02-190-1998
Koh Siak Poo v Sayang Plantation Berhad

(3) Federal Court
Civil Application No. 08-106-2000 (A)
Koh Siak Poo v Sayang Plantation Berhad

We refer to your letter dated 30th September 2002 and regret to advise that our client does not agree to accept RM802,125.92 in full and final settlement of the above matters as the said sum clearly does not include costs awarded in our client's favour. We are instructed by our client to return you the HOE HUP TIMBER INDUSTRIES SDN. BHD.'s PBB cheque No. 046012 for the sum RM802,125.92 for your further action.

We are now in the process of finalizing the bill of costs and we shall serve a copy of the same for your comment in due costs.

....

Yours faitufully,
(sgd.)

Encl.

M/s Mahinder Singh Dulku & Co in a rejoinder letter dated 9.10.2002 again forwarded the Cheque to M/s Lim Kean Siew & Co., the text whereof reads thus:

Surat Kami: K 12-23

Surat Tuan: BK/AL/685/87

9 October 2002

M/s Lim Kean Siew & Co
Advocates & Solicitors
5th Floor, Wisma Penang Garden
42, Jalan Sultan Ahmad Shah
10050 Penang

Dear Sirs,

Re: (1) Ipoh High Court Civil Suit No. 23-167-1998
Sayang Plantation Berhad v Koh Siak Poo

(2) Court of Appeal of Malaysia
Civil Appeal No. A-02-190-1998
Koh Siak Poo v Sayang Plantation Berhad

(3) Federal Court Civil Application No. 08-106-2000 (A)
Koh Siak Poo v Sayang Plantation Berhad

We refer to our letter dated 30/09/2002 and to your reply dated 01/10/2002.

We return herewith our client's cheque for the sum of RM802,125.92 being payment of the Judgment sum (including interest) due to your client. The aforesaid sum does not include costs as the same are not due and payable until the same have been taxed and a sealed Allocatur served on our client. You and your client do not, in law, have any lien on our client's document's in respect of untaxed costs.

In the circumstances we are instructed to give you and your client notice, which we hereby do, that unless our client's documents set out in our letter dated 30/09/2002 are returned to us within Forty Eight (48) hours of the receipt of this letter by you, we have firm instructions to file appropriate legal proceedings against both you and your client without further reference to you.

Yours faithfully,

(sgd.)

[7] In a rejoinder letter dated 11 October 2002, M/s Lim Kean Siew & Co (a) expressed acceptance by the appellant of the Cheque only as part payment of the entire judgment sum plus interest accrued (ie, RM864,375.05) and subject to its clearance and without prejudice to the appellant's right to recover an outstanding balance of RM62,249.13 and costs awarded by the courts; and (b) despatched to the respondent's solicitors the original title deed and original share certificates Nos. 1 to 20 referred to earlier, upon the latter's undertaking not to release the same until notified in writing by the former that the cheque was cleared. The text of the appellant's rejoinder letter dated 11 October 2002 which also gave reasons for the earlier refusal to accept the cheque, reads as follows:

Our Reference: BK/AL/685/87

Your Reference: K12-23

11th October 2002

Messrs Mahinder Singh Dulku & Co.
Advocates & Solicitors
No. 25, Green Hall
10200 Penang

Dear Sirs,

Re: (1) Ipoh High Court
Civil Suit No. 23-167-1998
Sayang Plantation Berhad v Koh Siak Poo

(2) Court of Appeal of Malaysia
Civil Appeal No. A-02-190-1998
Koh Siak Poo v Sayang Plantation Berhad

(3) Federal Court
Civil Application No. 08-106-2000 (A)
Koh Siak Poo v Sayang Plantation Berhad

We refer to our letter of the 9th day of October 2002 received by us yesterday.

Kindly take note that our clients rejected HOE HUP TIMBER INDUSTRIES SDN. BHD's PBB cheque No. 040612 for the sum of RM802,125.92 which was enclosed to your letter of the 30th day of October 2002 as they did not agree to accept the said sum "being full and final settlement of the judgment obtained by [our clients] as varied by the Order of the Court of Appeal dated 29.1.2000" as suggested in your letter of the 30th day of September 2002.

Now you have changed the proposition in your letter of the 9th day of October 2002 by claiming that the said sum is for "payment of Judgment sum (including interest) due to [our client]."

In view of the aforesaid changes, our clients are agreeable to accept he said cheque as part payment of the judgment sum and interest accrued and subject to clearance and without prejudice to their right to recover from your client the sum of RM62,249.13 being the balance thereof and the costs awarded by the Courts.

We are instructed to set out herein below a statement of account as at the 30th day of September 2002 for your easy reference.

		RM	RM
	Judgment Sum		663,000.00
Less:	Counter Claim		30,640.09
			632,359.91
Add:	Interest 8% per annum		
	1-3-1998 to 28-2-1999	50,588.73	
	1-3-1999 to 29-2-2000	50,588.73	
	1-3-2000 to 28-2-2001	50,588.73	
	1-3-2001 to 28-2-2002	50,588.73	
	1-3-2002 to 30-9-2002	29,660.24	232,015.14
			864,375.05
Less:	Hoe Hup Timber Industries Sdn. Bhd.'s PBB cheque No. 046012		802,125.92
			62,249.13

In the light of the circumstances, the threat contained in your letter of the 9th day of October 2002 is unreasonable and uncalled for and we take objection to the same.

To avoid unnecessary accusation and pending clearance of the said cheque, we are instructed by our clients to return the following documents to you on your undertaking not to release the same until the said cheque is cleared:

(a) the original Grant for Land of all that piece of land situate in the Mukim of Sungei Pasir sub-division Padang Temusu being portion No. 208 held under Grant 20386; and

(b) the original share certificates of Sayang Plantation Sdn. Bhd. bearing Certificate Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

We shall write to you once we are informed by our clients that the said cheque is cleared.

We shall serve on you the Bills of Costs shortly.

…
Yours faithfully,
(sgd.)
Encl.

[8] By letter dated 21 October 2002 M/s Lim Kean Siew & Co. informed M/s Mahinder Singh Dulku & Co. that the cheque had been cleared by the bank and advised the latter to release to the respondent the documents referred to in the letter dated 11 October 2002 of the former. The letter dated 21 October 2002 is in these terms:

Our Reference: BK/AL/685/87

Your Reference: K12-23

21st October 2002

Messrs Mahinder Singh Dulku & Co.
Advocates & Solicitors
No. 25, Green Hall
10200 Penang

Dear Sirs,

Re: (1) Ipoh High Court
Civil Suit No. 23-167-1998
Sayang Plantation Berhad v Koh Siak Poo

(2) Court of Appeal of Malaysia
Civil Appeal No. A-02-190-1998
Koh Siak Poo v Sayang Plantation Berhad

(3) Federal Court
Civil Application No. 08-106-2000 (A)
Koh Siak Poo v Sayang Plantation Berhad

We refer to the teleconversation between your Dato' Mahinder Singh and our Mr. Bernard Kok this afternoon.

We are instructed by our clients that HOE HUP TIMBER INDUSTRIES SDN. BHD.'s PBB cheque No. 046012 for the sum RM802,125.92 has been cleared by the bank and we are pleased to advise that you may release those documents referred to in our letter of the 11th Oactober 2002 to your client.

Yours faitufully,

(sgd.)

On 9 February 2003 the respondent filed an application in the High Court in Alor Setar by way of Originating Summons No: 24-110-2003 (MT-) asking for the following reliefs namely:

(1) an order that the caveat entered against Lot 208 be cancelled forthwith pursuant to, *inter alia*, s. 331(4)(a) of the National Land Code (Act 56/1965);

(2) an order directing the Registrar of Land Titles, Kedah or any other duly authorised officer in Kedah State to do all such acts and/or memorials as may be deemed necessary under Act 56/1965 to give effect to order (1) above including the due registration of that order;

A (3) an order that the defendant pay the plaintiff compensation for damage and/or loss that might have been caused by the failure of the former to timeously withdraw the caveat pursuant to s. 331(4)(b) of Act 56/1965;

B (4) a direction to the deputy registrar or the senior assistant registrar of the High Court to hold an enquiry to assess the compensation payable to the defendant; and

(5) costs.

C The application was supported by the affidavit of the respondent himself (respondent's affidavit No.1) affirmed and filed on 9 February 2003. The appellant entered appearance on 10 March 2003 and served on the respondent the same day. On 18 March 2003 the caveat was withdrawn by the appellant. On 20 March D 2003 one Ng Chor Weng the Managing Director of the appellant affirmed an affidavit in reply to respondent's affidavit No. 1 which was served on the respondent's solicitors on 21 March 2003 and filed with the High Court registry on 23 March 2003. On 26 March 2003 the plaintiff filed and served an affidavit in reply E affirmed on 25 March 2003 (respondent's affidavit No. 2) on the appellant.

Before The Judge In Chambers

F **[10]** The originating summons was heard and decided by the judge in chambers on 8 April 2003 who allowed the application and ordered in terms of reliefs (3), (4) and (5) therein which are summarised in the introduction to this judgment.

G **[11]** The grounds of judgment of the High Court Judge, written in the National Language, extracts whereof relevant to his reasoning can be found at p. 19 *et seq*. of the Appeal Record. For ease of reference they are here in reproduced:

> H Semasa kes ini didengar oleh saya pada 08-04-2003 Mahkamah telah dimaklumkan oleh kedua-dua pihak bahawa kaveat tersebut telah ditarik balik pada 18-03-2003 dan ini bermakna relif yang dipohon di bawah perenggan (1) dan (2) Saman Pemula tidak lagi relevan. Oleh itu Mahkamah hanya perlu memutuskan relif yang di pohon di bawah perenggan (3), (4) dan (5) Saman Pemula itu khususnya isu gantirugi. Setelah mendengar hujah daripada kedua- I dua pihak dan meneliti affidavit-afidavit yang difailkan saya telah

membenarkan permohonan Plaintif seperti dalam perenggan (3), (4) dan (5) itu tetapi dengan syarat bahawa untuk gantirugi Plaintif hanya berhak mendapat gantirugi atau pampasan bagi apa-apa kerugian yang dialami selepas 21-10-2002.

Pihak Defendan tidak berpuashati dengan keputusan tersebut dan telah memfailkan notis rayuan.

Seksyen 329(1) Kanun Tanah Negara 1965 memperuntukkan bahawa:

> Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

Kaveat Pemegang Lien tersebut dimasukkan oleh Defendan untuk memastikan penghakiman yang diperolehi oleh Defendan ke atas Plaintif dijelaskan oleh Plaintif. Jumlah tersebut telah dijelaskan oleh Plaintif pada 21-10-2002. Oleh it saya berpendapat selepas tarikh 21-10-2002 pihak Defendan tidak lagi berhak meneruskan kaveat tersebut ke atas Tanah tersebut. Ini bermakna kaveat yang dimasukkan oleh Defendan ke atas tanah tersebut selepas tarikh itu adalah tidak sah. Atas alasan itu Plaintif berhak mendapat gantirugi bagi apa-apa kerugian yang dialami olehnya akibat kaveat itu masih berkuatkuasa selepas tarikh itu. Atas alasan tersebut saya telah memutuskan bahawa Defendan patut membayar apa-apa kerugian yang dialami oleh Plaintif selepas 21-10-2002 ke atas Tanah tersebut yang disebabkan oleh kewujudan kaveat itu. Saya berpendapat ini adalah selaras dengan peruntukan Sek. 329(1) Kanun Tanah Negara.

Saya juga berpendapat alasan-alasan yang diberikan oleh Plaintif adalah tidak bermerit untuk Mahkamah menolak permohonan Plaintif bahawa Defendan membayar gantirugi ke atas kerugian tersebut. Dakwaan Defendan dan peguamcara Defendan bahawa mereka beranggapan bahawa surat peguamcara Plaintif bertarikh 30-09-2002 itu merujuk kepada kaveat persendirian adalah tidak berasas langsung. Surat tersebut tidak menyatakan kaveat persendirian tetapi Cuma menyebut kaveat sahaja. Lagipun sekiranya benar dakwaan mereka bahawa mereka tidak jelas dengan kandungan surat tersebut mereka sepatutnya meminta penjelasan daripada peguamcara Plaintif dan bukannya berdiam diri sahaja dan membuat andaian sendiri, ataupun mereka boleh membuat carian di Pejabat Tanah yang berkenaan untuk mendapat maklumat tentang kaveat itu. Saya juga berpendapat alasan lain yang diberikan oleh Defendan bahawa fail kes berkenaan di pejabat

peguamnya musnah dan peguam asal yang mengendalikan perkara itu telah berhenti daripada firma peguamcaranya adalah juga tidak bermerit.

Berdasarkan kepada alasan-alasan di atas saya telah membenarkan permohonan Plaintif seperti dalam perenggan (3), (4) dan (5) Saman Pemula.

In The Court Of Appeal

[12] At the outset of the appeal, a consent order was recorded that Koh Swee Lim (f) KP 651110-02-5372 be substituted for Koh Siak Poo (deceased), the respondent and costs be in the cause.

[13] In summary, the complaint on appeal according to Dato' Vendargon of learned counsel for the appellant was that the judge erred, when in dealing with the removal of a lien holder's caveat pursuant to s. 331 he applied s. 329 of Act 56/1965 which was only applicable to private caveats and ordered damages to be assessed for wrongful caveating, without applying and satisfying himself on the criteria in s. 331 of that Act.

In his outline submission, Dato' Vendargon pointed out that:

(i) the judge referred to and applied the provisions of s. 329 of Act 56/1965 to this case in awarding compensation;

(ii) s. 329 was applicable to private caveats and not lien holders' caveats as in this instant appeal;

(iii) in fact the correct provision governing lien holders' caveats was s. 331(4)(b) of Act 56/1965 which sets out different criteria and pre-conditions;

(iv) s. 331(4)(b) was not referred to by the judge.

[14] On points (iii) and (iv), Dato' Vendargon contended that although s. 331(4)(b) applied to lien holders' caveats, that subsection empowered the court to order payment of compensation "if the entry or failure to withdraw has caused damage or loss ..." These words, he emphasised, stipulated a precondition that the judge must make a finding or determination that 'The ... failure to withdraw ... caused damage or loss' - in stark contrast to s. 329 where the provision generally makes a person, who wrongfully secures entry or fails to withdraw a private

caveat liable to pay compensation. On that score he submitted that the judge failed to satisfy himself and determine the matters in respect of the precondition. In support of this submission, he pointed to the wording "that may have been sustained" in prayer (3) and to "any" damages that the defendant might be liable for at pp. 25-26 and p. 14 respectively of the Appeal Record. Further he pointed out that the learned judge in his grounds of judgment refers to damages that might have been sustained after 21 October 2002 at pp. 20 and 21 of the Appeal Record.

[15] Consequently, Dato' Vendargon submitted that points (iii) and (iv) above had merits adding that in fact no damage could be attributed to the caveat of the appellant and prayed that this appeal be allowed with costs.

[16] There was no response from Dato' Mahinder Singh Dulku of learned counsel for the respondent to points (i) and (ii) of Dato' Vendargon. Responding to the submissions of Dato' Vendargon, Dato' Mahinder Singh Dulku drew the attention of the court to relief (3) of the originating summons which expressly mentioned s. 331(4)(b) of Act 56/1965. That fact was indicative that the respondent would adduce evidence before the senior assistant registrar (SAR) who was to assess the compensation payable as prayed for in relief (4) of the originating summons having regard to the incidence of proof upon the respondent who claimed compensation. His point made was that there was no need to particularise the respondent's loss or damage which would be proved before the SAR. The bundle of authorities of the respondent listed two reported judgments of the High Court namely – *Infra Elite Development Sdn Bhd v. Pacific Treasure Land Sdn Bhd* [2002] 6 MLJ 545 and *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* [2003] 7 CLJ 24. Both these judgments bore on s. 329 of Act 56/1965. The bundle of authorities of counsel for the appellant listed no case law authority whatever, reported or otherwise. Dato' Vendargon intimated at the hearing that he would research further. To date, nothing was received.

The questions raised by these submissions were:

(a) whether the provisions of s. 329 or s. 331 of Act 56/1965 applied to the respondent's claim for compensation; and if the latter,

(b) whether the appellant was liable to pay compensation to the respondent thereunder.

[18] Having regard to the facts outlined above, the class of caveat and the relevant section of Act 56/1965 named in the entitulement and body of the originating summons it was patent that the relevant law on which the claim for compensation was based was s. 331(4) of Act 56/1965 being so specified. Thus we agreed with Dato' Mahinder Singh Dulku on this point. We also agreed with points (i) and (ii) above made by Dato' Vendargon. It was clear to us that the judge mistakenly addressed his mind to s. 329 when he held that the appellant was liable to compensate the respondent under that section. Further, it was also clear to us that no where in his grounds of decision did he consider s. 331(4)(b).

[19] On question (a) therefore, we hold that the relevant law applicable to the claim of the respondent for compensation is s. 331 of Act 56/1965 and not s. 329.

[20] Since an appeal to the Court of Appeal is by way of a re-hearing it was open to us to decide on the question of liability of the appellant to pay compensation to the respondent under s. 331 of Act 56/1965 and we did so based on the affidavit evidence filed in the court below.

[21] Section 331 so far as is relevant provides:

> 331 Determination of lien-holders' caveats
>
> (1) A lien-holder's caveat may be withdrawn at any time by a notice in writing given to the Registrar by the person or body for the time being entitled to the benefit of the lien, and the Registrar shall cancel the entry of the caveat as soon as may be after the notice is received.
>
> (2) …
>
> (3) The Registrar may cancel any lien-holder's caveat upon proof to his satisfaction that all sums due under the lien have been duly paid.
>
> (4) Where the Court is satisfied that any lien-holder's caveat ought not to have been entered, or ought to have been withdrawn, it may order:
>
> (a) the cancellation thereof by the Registrar, and

(b) if the entry or failure to withdraw has caused damage or loss to any person or body, the payment of compensation by the person or body at whose instance the entry was made or, as the case may be, by whom the withdrawal ought to have been effected.

(5) On cancelling the entry of any caveat pursuant to this section, the Registrar shall note on the register document of title the reason for the cancellation and the date thereof; and where any such entry is cancelled by reason of the withdrawal of the caveat, the Registrar shall give notice of the withdrawal to the person or body for the time being entitled to the land or … formerly affected.

(6) Every cancellation under sub-section (5) shall be signed and sealed.

[22] Under subsections (1) and (4) of s. 331, withdrawal of the lien-holders' caveats entered pursuant to the provisions of s. 281 of Act 56/1965 is a matter solely within the competence of the lien-holder. Under subsection (1) the lien-holder may or may not want to withdraw the caveat duly entered while still entitled to the benefit of the lien, there is thus no obligation or duty to withdraw thereunder. The wording of subsection (4) namely, "… caveat …, or ought to have been withdrawn … and (b) if the failure to withdraw has caused damage or loss … payment of compensation by the person or body at whose instance the entry was made or, … by whom the withdrawal ought to have been effected." is expressive of a corresponding duty or obligation on the part of lien-holder at whose instance the caveat is entered, to withdraw the caveat forthwith once the latter ceases to be entitled to the benefit of the lien. That duty or obligation is imposed under pain of a sanction to pay compensation to the person entitled to the land formerly affected in the event of a failure to withdraw the caveat and damage or loss is caused thereby.

[23] It was recorded in the grounds of judgment that the High Court was informed by both parties that the caveat had been withdrawn on 18 March 2003 which meant that reliefs (1) and (2) of the originating summons were not relevant anymore. Consequently, it was only necessary for the High Court to decide on reliefs (3), (4) and (5) of the originating summons, especially on compensation. After hearing submissions from both sides and perusal of the affidavits filed, the decision of the High Court was that the respondent's application be granted in terms of reliefs (1),

(2) and (3) with a proviso that the respondent was only entitled to compensation for damage or loss suffered after 21 October 2002.

[24] There was no dispute by the respondent about the validity of the lien of the appellant created over Lot 208. The entry of the caveat by the appellant on Lot 208 on 16 February 1988 and its continuance on the land register were non-issues. Further, there was no dispute that the appellant was duty bound to withdraw the caveat and also that the caveat ought to have been withdrawn but was not withdrawn by the appellant until 18 March 2003.

[25] The dispute before us was whether the caveat ought to have been withdrawn from 30 September 2002 as contended in paras. 9 and 10 of respondent's affidavit No. 1 at p. 43 of the Appeal Record or on 21 October 2002 as found by the judge below or 18 March 2003 as the appellant had actually done.

[26] 30 September 2002 was the date of the first letter from M/s Mahinder Singh Dulku & Co. to M/s Lim Kean Siew & Co. enclosing the cheque to the latter and stating that the amount of RM802,125.92 was in full and final settlement of the judgment and demanding the return to the former of the original title deed, all share certificates and other security documents held by the latter together with a duly executed withdrawal of caveat. The latter returned the cheque per their letter dated 1 October 2002 to the former on the ground that the RM802,125.92 did not include costs awarded to the appellant. On 9 October 2002, M/s Mahinder Singh Dulku & Co. forwarded the cheque again to M/s Lim Kean Siew & Co., this time stating that the cheque was for payment of the judgment sum (including interest) due to the appellant adding that untaxed costs was not due or payable and that in law the appellant had no lien on the respondent's documents. On 11 October 2002, M/s Lim Kean Siew & Co. agreed in writing to accept the cheque "as part payment of the judgment sum and interest accrued and subject to clearance and without prejudice to their right to recover from your client the sum of RM62,249.13 being the balance thereof and the costs awarded by the courts." In that letter too, they stated that pending clearance of the cheque they returned the original title deed and the original share certificates to M/s Mahinder Singh Dulku & Co. on the latter's undertaking not to release the same until the

cheque was cleared. On 21 October 2002, M/s Lim Kean Siew & Co. notified M/s Mahinder Singh Dulku & Co. that the cheque was cleared by the bank and advised the release of the original title deed and share certificates to the respondent.

[27] We construed the first letter dated 30 September 2002 of M/s Mahinder Singh Dulku & Co. as a letter of offer of final settlement from the respondent to the appellant upon terms that the original title deed, share certificates and other security documents be returned to the appellant immediately. The offer of RM802,125.92 worked out to be less than what the appellant was entitled to as disclosed in the letter of M/s Lim Kean Siew & Co. dated 11 October 2002 and, in our view the appellant was perfectly entitled to decline the offer which they did by their reply dated 1 October 2002. Accordingly, we reject the contention of Dato' Mahinder Singh Dulku that the caveat ought to have been withdrawn from 30 September 2002.

[28] We construed the second letter dated 9 October 2002 of M/s Mahinder Singh Dulku & Co. as a second letter of offer of final settlement from the respondent to the appellant, with an ultimatum that the respondent's documents be returned to them within 48 hours failing which they would resort to appropriate legal proceedings against both M/s Lim Kean Siew & Co. and the appellant without further reference.

[29] In general, the lien in question was a statutory lien secured by the caveat. Consequently, the entire judgment sum plus interest namely, RM864,375.05 as at 30 September 2002 was a secured debt. By s. 281(2), it was open to the appellant to apply to the High Court for an order for sale of Lot 208 to satisfy the judgment of that court as varied by the Court of Appeal. But there was nothing in the Appeal Record to show that the appellant resorted to the remedy available under s. 281(2).

[30] By their letters dated 11 October 2002 and 21 October 2002, we understood that the appellant had accepted the cheque, upon its clearance, in part satisfaction of the judgment debt plus interest to the specified extent of RM802,125.92 only on the basis of a secured debt, leaving a balance of RM62,249.13.

[31] The query here was what were the legal status of (a) the said balance of RM62,249.13, namely, whether it could still be categorised as a secured debt from 21 October 2002; and (b) the caveat, whether it ought to remain on the land register or ought to have been withdrawn from 21 October 2002.

[32] It would be recalled from those two letters that the event of the return of the original title deed and share certificates to the respondent followed immediately after notification by the appellant that the cheque was cleared by the bank. The sequence of events here was in accordance with an undertaking dictated by M/s Lim Kean Siew & Co. to M/s Mahinder Singh Dulku & Co. A fair inference of fact to be derived therefrom was that from 21 October 2002 the appellant no longer held the original title deed and the share certificates. With the acceptance of the cheque by the appellant and without the deposit of the original title deed, the appellant no longer had any lien over Lot 208. In short, the lien ceased to exist in fact and in equity from 21 October 2002 as regards the balance of RM62,249.13. Consequently, that balance of the judgment debt lost its character as a secured debt to become an unsecured debt and the appellant had in law, by those two letters, made an election to recover such balance as an unsecured debt. The legal implication arising therefrom was that recourse to s. 281(2) of Act 56/1965 was no longer available to the appellant to realise the balance of the judgment debt plus interest because it was not a secured debt. Being an unsecured debt, the appellant would have to resort to other remedies available to enforce that part of the judgment.

[33] Since the lien ceased to exist from 21 October 2002, it followed that the appellant ceased to be entitled to the benefit of such lien from that date. Thus we concluded that the caveat served no protective function from that date, ought not to remain on the land register and ought to have been withdrawn forthwith and that the appellant was duty bound to do so. The judge below would have been well justified under s. 331(4)(a) to order its cancellation with effect from that date if in fact it had not subsequently been withdrawn and reliefs (1) and (2) of the originating summons, pursued at the hearing before him.

[34] The caveat was not withdrawn even though the balance of the judgment debt of RM62,249.13 was settled on 20 December 2002 as deposed in para. 8 of the respondent's affidavit No. 1 at

p. 42 of the Appeal Record or when Originating Summons No. 24-110-2003 was filed on 9 February 2003. It was in fact withdrawn by the appellant on 18 March 2003. Consequently, we concluded for a fact that there had been failure by the appellant of its duty to withdraw the caveat.

[35] From 21 October 2002 to 18 March 2003 was a lapse of nearly five months for which there was no legal justification whatever for the caveat to remain on the land register.

[36] By subsection (5) of s. 330 of Act 56/1965 it is provided that "a lien-holder's caveat, shall so long as it continues in force, have the like effect as that specified in subsections (2) to (5) of s. 322 in relation to private caveats".

[37] Subsection (2) of s. 322 in turn provides that "the effect of any private caveat expressed to bind the land itself … shall, subject to subsections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto, any claim to the benefit of any tenancy exempt from registration granted by the said proprietor, and any lien-holder's caveat in respect thereof".

[38] The effect of a private caveat under s. 322(2) expressed to bind the land has been observed by Lord Diplock in *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 (PC) at p. 214 rt. hand column B-C:

> By section 322(2) the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. This is a very grave curtailment of the rights of the proprietor, it can be imposed at the instance of anyone who makes a claim to title to the land, however baseless that claim may turn out to be. By section 324 the Registrar is required to act in an administrative capacity only; he is not concerned with the validity of the claim on which the caveat purports to be based. If the document is in the correct form he must enter the caveat on the register and leave the registered proprietor to secure its removal and to claim compensation from the caveator for any damage he has suffered by reason of the entry of the caveat having been obtained by the caveator without reasonable cause.

[39] Since the lien-holder's caveat has the like effect to that of a private caveat, it followed that the observation of Lord Diplock on the effect of a private caveat quoted above applied with equal force to a lien-holder's caveat in the instant case. The lien in question was over Lot 208. The caveat was binding on Lot 208 and prohibited any dealings with Lot 208 during its continuance on the land register from 21 October 2002 to 18 March 2003. The caveat had in effect gravely curtailed the rights of the respondent as registered proprietor in that it wrongfully prevented him from dealing with Lot 208 over that period when the lien ceased to exist and with that, the appellant's entitlement to the benefit thereunder. Under such circumstance the failure to withdraw the caveat before 18 March 2003 'has caused damage or loss' to the respondent as envisaged under s. 331(4)(b) of Act 56/1965. There is therefore no necessity for the respondent to adduce further evidence on the issue of liability.

[40] We were satisfied that the caveat ought to have been withdrawn from 21 October 2002. Consequently, we hold on question (b) above that the appellant was liable to pay the respondent compensation for damage or loss (if any) caused to the latter from 21 October 2002 to 18 March 2003 by the failure of the appellant to withdraw the caveat.

[41] No determination or enquiry had been carried out by the deputy registrar or the senior assistant registrar, High Court Ipoh, on the matter of compensation pursuant to the direction of the judge and we recorded a fresh direction in that regard to be carried out by either of them.

Conclusion

[42] For these reasons stated we dismissed this appeal and made the orders recorded.

Tengku Baharudin Shah JCA (dissenting):

[43] There is only one issue in this appeal and that is whether damage or loss must be proved before compensation can be ordered under para. (b) of subsection (4) of s. 331 of the National Land Code. Any reference to any section hereafter in this judgment refers to that of the National Land Code. In the court below, a lien holder's caveat entered by the appellant on the

respondent's land (the subject land) had been withdrawn before the hearing of the respondent's application for its removal under the said section but the learned judge, at the respondent's instance, ordered compensation to be paid by the appellant to the respondent and directed the senior assistant registrar to hold an inquiry to assess the compensation that may be payable by the appellant to the respondent as a consequence of the appellant having failed to timeously withdraw the said caveat. In making the said order he purported to act under s. 329(1). Hence this grievance by the appellant before us.

The Background

[44] The appellant after having received a cheque as part payment for the amount due under their lien holder's caveat over the subject land released the document of title and share certificates held by them as security therefor to the respondent on 21 October 2002 upon clearance of the said cheque. Apart from requesting for a "duly executed withdrawal of caveat" from the appellant, no formal notice to withdraw the lien holder's caveat was given by the respondent. Without prior notice to the appellant however, the respondent on 9 February 2003 filed this application by way of originating summons (the OS) seeking the following orders for (in brief):

(1) the cancellation of the lien holder's caveat pursuant to s. 331(4)(a);

(2) the Registrar of Land Title to be directed to do all that is necessary to give effect to (1);

(3) in any event the appellant to pay compensation for damage and/or loss that might have been caused by the appellant's failure to withdraw the said caveat;

(4) the senior assistant registrar to be directed to hold an inquiry to assess the compensation that may be payable by appellant to the respondent as a consequence of appellant having failed to timeously withdraw the said caveat;

(5) costs of and incidental to this application;

(6) further and other relief.

[45] The application was fixed for hearing on 8 April 2003. Upon service of the OS on the appellant's solicitors, steps were taken to withdraw the said caveat which was withdrawn on 18 March 2003. As such, when the matter came before the court, prayers (1) and (2) of the respondent's application were no longer in issue. The court was on that date only concerned with the respondent's right to compensation for the appellant's late withdrawal. Orders in terms of prayers (3), (4) and (5) were thus granted.

Undisputed Facts

[46] The lien holder's caveat was in fact entered as long ago as 16 October 1988 by the appellant over the subject land. The appellant subsequently obtained judgment against the respondent for RM663,000 with interest and costs as varied by the Court of Appeal on 29 November 2000.

[47] On 30 September 2002 the respondent tendered a cheque for a sum of RM802,125.92 as "being full and final settlement of the said judgment" and sought the return of the original title deed, all share certificates and other security documents kept by the appellant together with a "duly executed withdrawal of caveat." The offer was rejected by the appellant who returned the said cheque on the ground that "the said sum clearly does not include costs awarded" and intimating that the appellant was in the process of finalising the bill of costs which would later be served on the respondent.

[48] The respondent by their solicitor's letter retendered the same cheque on 9 October 2002, this time as "being payment of judgment sum (including interest) due to your client" also contending that the appellant did not in law "have any lien over the respondent's documents in respect of untaxed costs". The respondent gave the appellant 48 hours notice to return their documents with threat of legal action.

[49] By their solicitor's letter dated 11 October 2002 showing the calculations for the amount due, the appellant agreed to accept the said cheque as part-payment of the judgment sum and interest accrued subject to its clearance and "without prejudice to their right to recover the balance interest of RM62,249.13 and the costs awarded by the courts." With the same letter the appellant

also returned the original grants and share certificates to the respondent's solicitors on their undertaking not to release the same until the cheque was cleared.

[50] On the cheque being cleared, the respondent's solicitors were on 21 October 2002 so advised and told that they could release the said documents. The balance of interest of RM62,249.13 was only paid by the respondent under cover of their solicitors' letter of 20 December 2002.

[51] In the meantime, the respondent had apparently entered into a sale and purchase agreement dated 13 September 2002 purporting to sell the subject land to one Low Ah Kow whose solicitors on 14 October 2002 wrote to the respondent terminating the said sale on the ground that the respondent failed to deliver the original documents of title by the agreed completion date. They also demanded the return of the deposit of RM500,000 and payment of a further RM500,000 as agreed liquidated damages.

In The High Court

[52] In the court below, learned counsel then acting for the appellant resisted the making of the orders contending that the respondent was not liable to pay any compensation as the respondent entered into the sale and purchase agreement before full payment. She argued that the appellant was not obliged to withdraw the caveat until the judgment debt had been paid in full on 21 October 2002.

[53] The learned judge, in granting orders in terms of prayers (3), (4) and (5) of the respondent's application, purported to rely on s. 329. After quoting the said section in his grounds of decision, he said as follows:

> Kaveat Pemegang Lien tersebut dimasukkan oleh Defendan untuk memastikan penghakiman … dijelaskan oleh Plaintif. Jumlah tersebut telah dijelaskan oleh Plaintif pada 21.10.2002. Oleh itu saya berpendapat selepas tarikh 21.10.2002 pihak Defendan tidak lagi berhak meneruskan kaveat tersebut …
>
> Atas alasan itu Plaintif berhak mendapat gantirugi bagi apa-apa kerugian yang dialami olehnya akibat kaveat itu masih berkuat kuasa selepas tarikh itu. Atas alasan tersebut saya telah memutuskan bahawa Defendan patut membayar apa-apa kerugian yang dialami oleh Plaintif selepas 21.10.2002 … Saya berpendapat ini adalah selaras dengan peruntukan seksyen 329(1) Kanun Tanah Negara.

A

The Law

[54] For ease of reference ss. 327(1), 329(1) and 331(4) are as follows:

B

> 327(1). Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

C

> 329(1). Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

D

> 331(4). When the Court is satisfied that any lien holder's caveat ought not to have been entered, or ought to have been withdrawn, it may order:
>
> (a) the cancellation thereof by the Registrar, and
>
> (b) if the entry or failure to withdraw has caused damage or loss to any person or body, the payment of compensation by the person or body at whose instance the entry was made or, as the case may be, by whom the withdrawal ought to have been effected.

E

Contentions Of Parties

F

[55] Before us learned counsel for the appellant submitted that his grounds of appeal can be crystallized as:

G

> That the learned Judge erred, when in dealing with the removal of a lien holder's caveat pursuant to section 331 NLC, he applied section 329 NLC, which is only applicable to private caveats and ordered damages to be assessed for wrongful caveating, without applying and satisfying himself on the criteria in section 331 NLC.

H

He pointed to the significant difference between the two sections in that whilst s. 331(4)(b) imposes two preconditions for granting the order of compensation, namely:

I

1. the court is satisfied that the lien holder's caveat ought not to have been entered or ought to have been withdrawn, and
2. the entry or failure to withdraw has caused damage or loss to any person or body;

section 329(1) provides for automatic right to compensation once entry of a private caveat or failure to remove it is proved to be wrongful. He emphasised that, in the case of the former, even if the first condition is satisfied, compensation under para. (b) can only be ordered if damage or loss is shown to have been caused, and not otherwise.

[57] In his reply, learned counsel for the respondent referred us to the impugned order of court which expressly specifies compensation pursuant to s. 331(4)(b). In any event, he said, there is no practical difference between the two sections as s. 329(1) states that compensation is payable to those "who thereby suffers any damage or loss" which also mean damage has been suffered for the order to be made. He argued that the principle is the same for both sections in that the issue is whether the caveat was wrongly entered or retained and if so damages is only consequential. He purported to rely on the decisions of this court in *Trans-summit Sdn Bhd v. Chun Nyiok Lin* [1998] 3 MLJ 247 and of the High Court in *Infra Elite Development Sdn Bhd v. Pacific Treasure Land Sdn Bhd* [2002] 4 CLJ 633 and *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* [2003] 7 CLJ 24.

Finding

[57] The learned judge has obviously misdirected himself in law when applying s. 329(1) which pertains to private caveats instead s. 331(4) under which the respondent correctly sought relief. It is trite that where the law provides a right or remedy and prescribes the manner for recourse to it, anyone seeking such right or remedy must avail himself to such manner of recourse and no other. The Federal Court in *Land Executive Committee Of The Federal Territory v. Harper Gilfillan Bhd.* [1981] 1 MLJ 234 adopted this general rule established in the English case of *Pasmore v. Ostwaldtwistle Urban District Council* [1898] AC 387 that where an Act creates an obligation and enforces the performance in a specific manner, the performance cannot be enforced in any other manner. It must necessary follow that the court granting the remedy is equally bound to the letter of the applicable law.

[58] While the learned judge has fundamentally erred in applying the wrong provision of the Code to granting the relief sought in this case, the question is whether such an error is fatal to the respondent's claim and would nullify the order made? To answer

A that, we need to look at the appropriate legal provision, which is s. 331(4) and see whether it permits the granting of the order in the circumstances of this case. If all the requirements of that section are fulfilled it would be unjust to strike the order despite the error.

B

[59] I would agree with the learned counsel for the appellant that ss. 329(1) and 331(4) are significantly different in that the liability in the former is automatic whereas the latter is subject to preconditions being met. The words "shall be liable to pay C compensation" in s. 329(1) are self-explanatory in that liability attaches the moment wrongful entry or failure to withdraw a private caveat is proven. On the contrary, the words "may order" are used in s. 331(4) which gives the court, a discretion to order the cancellation of the lien holder's caveat under para. (a) only or D also the payment of compensation under para. (b). As para. (b) begins with the word "if" the words "the entry or failure to withdraw has caused damage or loss" following it stipulate the precondition to be met. That literally means that the court may only order the payment of compensation under para. (b) if damage E or loss has been caused by the entry or failure to withdraw and not otherwise. Accordingly the answer to the question posed must be positive.

[60] The rationale for the distinction between the two sections is F simple enough. Anyone claiming title to or interest in land may enter a private caveat under s. 323 but only an aggrieved person may apply to the court for its removal under s. 327. The registered proprietor of the land is an aggrieved person as his rights over it is gravely curtailed in that he is prevented from G registering any disposition thereof except with the caveator's consent, however baseless the caveator's claim may turn out to be. Any other person would only be an aggrieved person if he can establish that he has such an interest in the land as would make him aggrieved by the existence of the caveat – see *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212. In effect damage or H loss suffered by the applicant would have been established before the court would even consider the caveator's right to maintain the caveat and failing which order its removal. The liability under s. 329(1) naturally follows the event.

I

[61] A lien holder's caveat, on the other hand, can only be entered by the lien holder, who does so as of right, to safeguard his lien for which the title was deposited with him as security. The caveator thus assumes the position of the registed proprietor who no longer has any right to dispose of the said land until the title is redeemed. Such caveat can only be withdrawn by the caveator or cancelled by order of court. While the court may order its cancellation merely upon being satisfied of its wrongful entry or failure to withdraw, it would not be in a position to order compensation unless liability thereto is also established, and that is by any damage or loss being shown to have been suffered by the applicant upon whom the burden of proof lies. Hence the requirement of the law that compensation may only be ordered under para. (b) "if the entry or failure to withdraw has caused damage or loss".

[62] In any event, the golden rule of construction is that words used by the legislature must be read according to its plain and ordinary meaning. The principle enunciated by Lord Diplock in *Duport Steel Ltd v. Sirs* [1980] 1 All ER 529, 541 is that where the meaning of words in the statute is plain and unambiguous the judge should not invent fancy ambiguities. Full effect must be given to the words. To quote the words of Mohd Azmi SCJ in the Supreme Court case of *Wong Pot Heng v. Zainal Abidin Putih & Anor* [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312: "Where there is no ambiguity in the legislation, the court has no other duty but to adopt the literal and strict construction rule even though the result may appear to produce an unpopular result."

[63] Applying this golden rule, the words used in s. 331(4)(b) admit no uncertainty nor ambiguity, as the day follows the night, in that payment of compensation may only be ordered by the court if and only if the entry or failure to withdraw a lien holder's caveat is proved to have caused damage or loss to the applicant. In other words liability only arises upon proof of damage or loss. There is no ambiguity in the meaning of the words used in the section nor in the intention of the legislature in enacting them.

[64] Be that as it may, the legislature could have drafted a common provision or used similar words to cover both situations if the same effect was intended. But this is not done. The dissimilarity must therefore be taken to be intended and be given full effect. The contention of the learned counsel for the

respondent is therefore clearly flawed and untenable. The authorities relied on by him are totally irrelevant being cases dealing with issues pertaining to private caveats.

[65] The next question is whether any damage or loss has been suffered by the respondent in this case. The only evidence adduced by the respondent of any loss sustained is the solicitor's letter dated 14 October 2002 terminating the sale and purchase agreement dated 13 September 2002 and demanding the return of deposit and payment of agreed liquidated damages. Without the agreement itself being produced, the transaction referred to is highly suspicious and too good to be true. It is inconceivable that a land transaction of such magnitude, considering that close to RM1,000,000 had to be paid to redeem the title, was expected to be completed within one month of its execution which was even before the first offer of repayment of the debt by the respondent to the appellant on 30 September 2002. The court can take judicial notice that even ordinary land trasactions normally provide for at least three months for completion. Anyway, this is not a fact taken in argument before us though the absurdity is glaring.

[66] As pointed out by the learned counsel for the appellant in the court below, the appellant was not obliged to withdraw the caveat until the judgment debt had been paid in full which was on 21 October 2002. If any liability is to be attached it should only be to damage or loss suffered after that date. This is in fact also the finding of the learned judge himself which is reflected in the order he made and in his grounds of decision. If the respondent, being fully aware that the land title was still encumbered, risked entering into such a sale and purchase agreement, they have only themselves to blame for any loss suffered as they only gave themselves two weeks to fulfill their obligation, which is an impossibility in the circumstances. Anyway, the purported notice is nothing more than a solicitor's threat to take legal action and as the alleged loss, if suffered, was before 21 October 2002, no liability should be attached to the appellant. The learned judge is therefore wrong to grant the order that he did as it is also contrary to and inconsistent with his own finding. Also, in the circumstances of this case the respondent undoubtedly failed to meet the requirements of s. 331(4)(b).

[67] Finally, it is pertinent to note that the respondent did not at any time request the appellant to withdraw the lien holder's caveat entered fourteen years earlier. Any kind of notice or reminder would have sufficed. Such unreasonable conduct of the respondent not only lends credence to the appellant's claim of inadvertence for the delay in the withdrawal of the caveat but also questions the true intentions and *bona fide* of the respondent. As opposed to that, we have the appellant's willingness to release the land titles even before the full amount of their claim was satisfied and the immediate steps taken by them to effect the withdrawal of the said caveat after the writ was served on them. For one seeking for the discretion of the court to be exercised, the respondent does not appear to have come clean.

[68] For all the reasons aforesaid, I would allow this appeal and set aside the order of the High Court. The parties are to bear their own costs. In the event, I must however defer to the majority decision of this court to the contrary.